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2 UNITED STATES DISTRICT COURT  
3 NORTHERN DISTRICT OF CALIFORNIA  
4 SAN JOSE DIVISION

5 UNITED STATES OF AMERICA, ) CR-18-00258-EJD  
6 )  
7 PLAINTIFF, ) SAN JOSE, CALIFORNIA  
8 )  
9 VS. ) DECEMBER 16, 2020  
10 ELIZABETH A. HOLMES, ) PAGES 1 - 33  
11 )  
12 DEFENDANT. )  
13 \_\_\_\_\_ )

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TRANSCRIPT OF ZOOM PROCEEDINGS  
BEFORE THE HONORABLE NATHANAEL COUSINS  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S (ZOOM):

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE  
BY: JOHN C. BOSTIC  
JEFFREY B. SCHENK  
150 ALMADEN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113  
  
BY: ROBERT S. LEACH  
VANESSA BAEHR-JONES  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:

IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S (ZOOM): (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP  
BY: LANCE A. WADE  
AMY MASON SAHARIA  
PATRICK LOOBY  
725 TWELFTH STREET, N.W.  
WASHINGTON, D.C. 20005  
  
LAW OFFICE OF JOHN D. CLINE  
BY: JOHN D. CLINE  
ONE EMBARCADERO CENTER, SUITE 500  
SAN FRANCISCO, CALIFORNIA 94111

1 SAN JOSE, CALIFORNIA

DECEMBER 18, 2020

2 P R O C E E D I N G S

11:05AM 3 (COURT CONVENED AT 11:05 A.M.)

11:05AM 4 THE CLERK: CALLING CRIMINAL 18-0258, UNITED STATES  
11:05AM 5 VERSUS ELIZABETH HOLMES.

11:05AM 6 BEGINNING WITH GOVERNMENT COUNSEL, PLEASE STATE YOUR NAME  
11:05AM 7 FOR THE RECORD.

11:05AM 8 MR. BOSTIC: JOHN BOSTIC FOR THE UNITED STATES.

11:05AM 9 MR. LEACH: GOOD MORNING, YOUR HONOR.

11:05AM 10 ROBERT LEACH FOR THE UNITED STATES.

11:05AM 11 THE COURT: GOOD MORNING.

11:05AM 12 MR. WADE: GOOD MORNING, YOUR HONOR.

11:05AM 13 LANCE WADE ON BEHALF OF ELIZABETH HOLMES. WITH ME THIS  
11:05AM 14 MORNING OUT THERE ARE MY COLLEAGUES, AMY SAHARIA AND  
11:05AM 15 PATRICK LOOBY.

11:05AM 16 MS. HOLMES IS ALSO PRESENT. I RECOGNIZE HER ON THE  
11:05AM 17 SCREEN. SO THE COURT IS AWARE, WE HAVE SET UP A MECHANISM BY  
11:05AM 18 WHICH WE ARE ABLE TO COMMUNICATE WITH HER IF NEED BE, AND IF  
11:05AM 19 THAT BECOMES NECESSARY, I WILL ADVISE THE COURT OF THAT AND  
11:05AM 20 SEEK THE COURT'S INDULGENCE FOR A BRIEF RECESS, OTHERWISE SHE  
11:06AM 21 CONSENTS TO PROCEEDING IN THIS MANNER.

11:06AM 22 THE COURT: THANK YOU, MR. WADE. GOOD MORNING,  
11:06AM 23 MS. HOLMES.

11:06AM 24 AND ON THE ISSUE OF COMMUNICATION, YES, IF AT ANY POINT  
11:06AM 25 YOU WOULD LIKE TO PAUSE SO YOU CAN HAVE A CONFIDENTIAL

11:06AM 1 COMMUNICATION WITH YOUR CLIENT OR CONVERSELY IF SHE WOULD LIKE  
11:06AM 2 TO HAVE A CONFIDENTIAL COMMUNICATION WITH YOU, PLEASE BRING IT  
11:06AM 3 TO MY ATTENTION, AND WE WILL PAUSE FOR THAT PURPOSE.

11:06AM 4 WE ARE PROCEEDING REMOTELY BECAUSE OF THE PANDEMIC, AND  
11:06AM 5 THANK YOU FOR HAVING CONSENTED TO OUR PROCEDURES FOR THAT  
11:06AM 6 REASON.

11:06AM 7 WE ARE MAKING A RECORDING OF THIS MORNING'S HEARING. A  
11:06AM 8 REMINDER FOR THOSE WHO ARE OBSERVING THE HEARING THAT NO  
11:06AM 9 BROADCAST, TRANSMISSION, OR ANY LIVE TRANSMISSION OF OUR  
11:06AM 10 HEARING IS PERMITTED. THE PARTIES MAY USE THE TRANSCRIPT, OF  
11:06AM 11 COURSE, FOR THEIR PURPOSES IN THE CASE.

11:06AM 12 AND THIS HEARING IS ON A REFERRAL FROM JUDGE DAVILA, THE  
11:07AM 13 TRIAL JUDGE. BOTH PARTIES MAY OBJECT TO MY RULING ON THE ORDER  
11:07AM 14 ON THE EVIDENTIARY ISSUES AND MUST DO SO WITHIN 14 DAYS OF MY  
11:07AM 15 RULING BACK TO JUDGE DAVILA.

11:07AM 16 THAT'S OUR PROCEDURAL POSTURE TODAY.

11:07AM 17 OF COURSE WE'RE HERE ON THE GOVERNMENT'S MOTION ON AN  
11:07AM 18 EVIDENTIARY ISSUE ARISING FROM ASSERTED PRIVILEGES OF  
11:07AM 19 MS. HOLMES. I'VE RECEIVED OPPOSITION AND REPLY BRIEF IN  
11:07AM 20 PREPARATION FOR THE HEARING TODAY.

11:07AM 21 MR. BOSTIC, I'LL START WITH YOU IF YOU'RE THE ONE TO  
11:07AM 22 ADDRESS THE ISSUES FOR THE GOVERNMENT. GIVE ME A LITTLE BIT OF  
11:07AM 23 PRECISION AS TO WHAT YOU'RE SEEKING. THERE ARE 13 EXHIBITS,  
11:07AM 24 TRIAL EXHIBITS IDENTIFIED IN THE PAPERS BETWEEN THE PARTIES,  
11:07AM 25 BUT SOME LOFTIER WORDS IN THE MOTION ABOUT WHETHER -- WHAT

11:07AM 1 YOU'RE SEEKING IS SOMETHING BROADER THAN JUST THOSE TRIAL  
11:08AM 2 EXHIBITS, IF YOU'RE WANTING AN ORDER THAT, FOR EXAMPLE, GOES TO  
11:08AM 3 ALL BOISE SCHILLER REPRESENTATIONS AND COMMUNICATIONS OR IF  
11:08AM 4 THERE IS SOMEWHERE IN BETWEEN AS FAR AS WHAT YOU'RE ASKING ME  
11:08AM 5 TO RULE.

11:08AM 6 AND, OF COURSE, THERE ARE ADDITIONAL MOTIONS IN LIMINE  
11:08AM 7 DEALING WITH MANY OTHER ISSUES AT TRIAL, AND I KNOW THOSE FOR  
11:08AM 8 CONTEXT, BUT THE PARTIES HERE HAVE MUCH MORE GRANULAR KNOWLEDGE  
11:08AM 9 ABOUT THE PARTICULAR TRIAL EXHIBITS AND OTHER TESTIMONY THAT  
11:08AM 10 YOU MIGHT USE AT TRIAL.

11:08AM 11 SO I THINK YOU'RE A LITTLE AHEAD OF ME AS TO YOUR -- AS TO  
11:08AM 12 WHAT YOU KNOW.

11:08AM 13 BACK OUT A LITTLE BIT AND GIVE ME SOME CONTEXT FOR WHERE  
11:08AM 14 THIS DISPUTE FITS IN WITH THE BIGGER PICTURE.

11:08AM 15 MR. BOSTIC: YES, YOUR HONOR. I'LL DO MY BEST. AND  
11:08AM 16 PLEASE FOLLOW UP WITH ADDITIONAL QUESTIONS IF I DON'T ANSWER  
11:08AM 17 THE COURT'S FULL QUESTION.

11:08AM 18 THIS DISPUTE HAS BEEN, I THINK, PERCOLATING FOR A WHILE  
11:08AM 19 BETWEEN THE PARTIES. I THINK, AS THE COURT CAN INFER FROM THE  
11:08AM 20 PARTIES' BRIEFING, AT VARIOUS TIMES THROUGHOUT THE LITIGATION  
11:08AM 21 THE DEFENSE HAS ALSO RAISED THE SPECTER OF A POSSIBLE PRIVILEGE  
11:09AM 22 OR AN ASSERTED PRIVILEGE BELONGING TO MS. HOLMES PERSONALLY IN  
11:09AM 23 HER PERSONAL CAPACITY AS OPPOSED TO IN HER CAPACITY AS CEO OF  
11:09AM 24 THERANOS AND A REPRESENTATIVE OF THE COMPANY.

11:09AM 25 THAT HAS COME UP IN CONNECTION WITH THE GOVERNMENT'S

11:09AM 1 EARLIER EFFORTS TO COLLECT DOCUMENTS FROM THERANOS ITSELF AS  
11:09AM 2 THE COMPANY WAS SHUTTING DOWN. IT CAME UP LATER IN VARIOUS  
11:09AM 3 INSTANCES WHERE PARTICULAR DOCUMENTS OF INTEREST WERE  
11:09AM 4 IDENTIFIED BY THE GOVERNMENT, AND NOW IT HAS COME UP IN THE  
11:09AM 5 CONTEXT OF THESE 13 DOCUMENTS THAT THE COURT REFERENCED THAT  
11:09AM 6 ARE ON THE GOVERNMENT'S TRIAL EXHIBIT LIST AND ABOUT WHICH THE  
11:09AM 7 DEFENSE ASSERTS THE OBJECTION THAT THEY ARE PRIVILEGED.

11:09AM 8 SO AS FAR AS THE SCOPE OF THE RELIEF SOUGHT IN THE  
11:09AM 9 GOVERNMENT'S MOTION, I CAN CLARIFY THAT. THE GOVERNMENT IS  
11:09AM 10 SEEKING A RULING ONLY AS TO THOSE 13 DOCUMENTS.

11:09AM 11 TO THE EXTENT THAT THE BRIEFING DISCUSSES THE GENERAL  
11:09AM 12 ISSUE OUTSIDE OF THOSE 13 DOCUMENTS, IT'S TO GIVE THE COURT  
11:09AM 13 THAT CONTEXT AND BECAUSE I THINK THE COURT'S RULING ON THOSE 13  
11:10AM 14 DOCUMENTS WILL BE INSTRUCTIVE TO THE PARTIES ON OTHER MATERIALS  
11:10AM 15 AND TOPICS.

11:10AM 16 THE COURT: AND THAT'S WHERE I MIGHT NEED SOME MORE  
11:10AM 17 HELP TO ENSURE THAT -- TO THE EXTENT THAT I'M GIVING  
11:10AM 18 INSTRUCTIONS OUTSIDE OF THOSE 13 DOCUMENTS, WHAT EXACTLY I'M  
11:10AM 19 INSTRUCTING. FOR EXAMPLE, ARE THERE OTHER DOCUMENTS NOT BEFORE  
11:10AM 20 ME THAT MY RULING MIGHT IMPACT THEIR ADMISSION AT TRIAL AND IS  
11:10AM 21 THERE TESTIMONIAL EVIDENCE FROM WITNESSES WHERE THERE ALSO  
11:10AM 22 MIGHT BE A PRIVILEGE ASSERTION MADE IN MY RULING AS TO  
11:10AM 23 MS. HOLMES'S ABILITY TO RAISE THESE EVIDENTIARY PRIVILEGE  
11:10AM 24 OBJECTIONS IS ALSO GOING TO IMPLICATE THOSE?

11:10AM 25 TELL ME MORE ABOUT THE CONSEQUENCE OF MY RULING ONE WAY OR

11:10AM 1 THE OTHER ON THIS MOTION.

11:10AM 2 MR. BOSTIC: SO, YOUR HONOR, I THINK IT DEPENDS ON  
11:10AM 3 THE NATURE OF THE COURT'S RULING AND HOW THE COURT FRAMES THAT  
11:10AM 4 RULING. AND IT'S HARD TO SAY SITTING HERE WHAT THE DOWNSTREAM  
11:10AM 5 IMPLICATIONS MIGHT BE, BUT THERE MAY BE OTHER DOCUMENTS THAT  
11:11AM 6 FIT INTO A SIMILAR CATEGORY. AGAIN, NONE OF THEM HAVE  
11:11AM 7 CURRENTLY BEEN IDENTIFIED ON THE GOVERNMENT'S OR I BELIEVE THE  
11:11AM 8 DEFENSE'S TRIAL EXHIBIT LIST, BUT TO THE EXTENT THAT ADDITIONAL  
11:11AM 9 SIMILAR DOCUMENTS ARE ADDED IN THE FUTURE, THE PARTIES MAY RELY  
11:11AM 10 ON OR REFERENCE THE COURT'S RULING AS INSTRUCTIVE AS TO HOW THE  
11:11AM 11 COURT WOULD LIKELY RULE ON THOSE OTHER DOCUMENTS.

11:11AM 12 SIMILARLY, TO THE EXTENT THAT THE GOVERNMENT OR THE  
11:11AM 13 DEFENSE SEEKS TO INTRODUCE TESTIMONY FROM DAVID BOIES OR FROM  
11:11AM 14 ANOTHER LAWYER AT BOIES SCHILLER, THE COURT'S RULING ON THESE  
11:11AM 15 SIMILAR DOCUMENTS MAY AGAIN BE INSTRUCTIVE, NOT DIRECTLY I  
11:11AM 16 THINK DECIDING THE ISSUE, BUT MIGHT BE INSTRUCTIVE ON THE  
11:11AM 17 QUESTION OF WHETHER THOSE TOPICS OR THAT TESTIMONY MIGHT  
11:11AM 18 TRIGGER SOME KIND OF PRIVILEGE PROTECTIONS.

11:11AM 19 SO I THINK AS THE COURT CAN SEE FROM THE PARTIES'  
11:11AM 20 BRIEFING, THERE'S A DISAGREEMENT HERE AS TO EVEN WHAT STANDARD  
11:11AM 21 NEEDS TO APPLY IN THESE SORTS OF COMMUNICATIONS, AND I THINK  
11:11AM 22 THE COURT'S GUIDANCE ONE WAY OR THE OTHER WILL BE VALUABLE TO  
11:12AM 23 THE PARTIES, NOT JUST IN CONNECTION WITH THESE DOCUMENTS, BUT  
11:12AM 24 IN GENERAL GOING FORWARD.

11:12AM 25 THE COURT: AND ARE THE WITNESSES OTHER THAN

11:12AM 1 MR. BOIES WHO I SHOULD BE FOCUSSED ON IN MAKING THIS RULING?

11:12AM 2 MR. BOSTIC: BASED ON THE DEFENSE'S CURRENT  
11:12AM 3 ASSERTIONS NONE COME TO MIND, YOUR HONOR. I'M NOT SURE WHETHER  
11:12AM 4 THE DEFENSE'S THINKING ON THIS, THIS MATTER ALSO EXTENDS TO  
11:12AM 5 IN-HOUSE ATTORNEYS WHOSE TESTIMONY THE GOVERNMENT MIGHT SEEK TO  
11:12AM 6 PRESENT.

11:12AM 7 THE COURT: ALL RIGHT. THANK YOU.

11:12AM 8 LET ME GET MR. WADE'S PERSPECTIVE OR ANY OF HIS TEAMMATES  
11:12AM 9 AS TO THE CONSEQUENCE OF THIS RULING JUST TO MAKE SURE THAT I  
11:12AM 10 UNDERSTAND HOW THIS IS GOING TO IMPACT THE TRIAL AND BEFORE I  
11:12AM 11 RULE.

11:12AM 12 MR. WADE: THANK YOU, YOUR HONOR.

11:12AM 13 AS YOUR HONOR WELL KNOWS, AN EVIDENTIARY PRIVILEGE DOES  
11:12AM 14 NOT EXIST IN A VACUUM. IT'S NOT AN AMORPHOUS THING. IT  
11:12AM 15 RELATES TO PARTICULAR COMMUNICATIONS BETWEEN AN ATTORNEY AND A  
11:13AM 16 CLIENT.

11:13AM 17 WITH RESPECT TO THE COMMUNICATIONS THAT ARE AT ISSUE,  
11:13AM 18 THESE 13 COMMUNICATIONS, THERE'S NUANCES TO SOME OF THE  
11:13AM 19 COMMUNICATIONS, BUT I THINK IT'S BEYOND DISPUTE THAT THERE'S AN  
11:13AM 20 ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO THE BOIES SCHILLER  
11:13AM 21 LAW FIRM AND OUR CLIENT IN MULTIPLE RESPECTS, BUT IT'S ALL BUT  
11:13AM 22 CONCEDED AT THE BEGINNING OF THE RELEVANT TIME PERIOD AND AT  
11:13AM 23 THE END OF THE RELEVANT TIME PERIOD BECAUSE -- AND OUR  
11:13AM 24 ARGUMENT, TO BE CLEAR, IS THAT THAT CONTINUED THROUGHOUT AND IN  
11:13AM 25 PARTICULAR CONTINUED WITH RESPECT TO THE 13 DOCUMENTS THAT ARE



11:13AM 1 AT ISSUE.

11:13AM 2 TO THE EXTENT THAT THE GOVERNMENT SEEKS TO ADVANCE SOME  
11:13AM 3 OTHER ARGUMENT, THAT'S -- WE WELCOME THAT DISCUSSION, AND WE'RE  
11:13AM 4 HAPPY TO GO THROUGH A PROCESS WHERE WE ENGAGE WITH THE  
11:13AM 5 GOVERNMENT ON THAT.

11:13AM 6 I'D LIKE TO BE CLEAR HERE THAT THERE'S NOTHING NEFARIOUS  
11:13AM 7 IN ANY WAY ABOUT A DEFENDANT ASSERTING HER RIGHTS WITH RESPECT  
11:14AM 8 TO A PRIVILEGE. IN FACT, AS THE COURT AND THE GOVERNMENT  
11:14AM 9 COUNSEL WELL KNOW, IF MS. HOLMES DID NOT ASSERT HER RIGHTS WITH  
11:14AM 10 RESPECT TO PRIVILEGES, THEY WOULD BE WAIVED, AND THERE WOULD BE  
11:14AM 11 CONSEQUENCES THAT WOULD FLOW FROM THAT.

11:14AM 12 SO GOVERNMENT COUNSEL IS CORRECT THAT WE HAVE, SINCE BEING  
11:14AM 13 ENGAGED IN THIS MANNER, CONSISTENTLY ADVISED THE GOVERNMENT AS  
11:14AM 14 TO MS. HOLMES'S POSITION WITH RESPECT TO ATTORNEY-CLIENT  
11:14AM 15 PRIVILEGE RELATIONSHIPS, AND WE'VE DONE SO IN A GOOD FAITH WAY  
11:14AM 16 BASED UPON THE INFORMATION THAT IS AVAILABLE TO US.

11:14AM 17 AS I NOTED IN THE BRIEFING, WE HAVE NOT SOUGHT TO APPLY  
11:14AM 18 THAT PRIVILEGE TO EVERY LAW FIRM THE COMPANY ENGAGED, AND IT'S  
11:14AM 19 SET FORTH IN OUR BRIEF, OUR REPLY BRIEF. THEY'VE ENGAGED MANY.

11:14AM 20 BUT THIS IS A UNIQUE RELATIONSHIP AND THE SCOPE AND THE  
11:14AM 21 APPLICATION OF THE PRIVILEGE, UNFORTUNATELY, HAS TO BE DONE IN  
11:14AM 22 A COMMUNICATION-BY-COMMUNICATION BASIS.

11:14AM 23 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

11:15AM 24 MR. WADE, STICKING WITH YOU. AS YOU NOTED THERE WAS AN  
11:15AM 25 ATTORNEY-CLIENT RELATIONSHIP. THE QUESTION IS WHETHER IT WAS

11:15AM 1 AN INDIVIDUAL RELATIONSHIP OR IF IT WAS A CORPORATE  
11:15AM 2 RELATIONSHIP OR BOTH, AND THEN TO FIGURE OUT THE TIMEFRAME FOR  
11:15AM 3 EACH OF THOSE, AND THEN TO APPLY THAT TO INDIVIDUAL  
11:15AM 4 COMMUNICATIONS.

11:15AM 5 SO FOCUSING ON THE ASSERTION THAT THERE'S AN INDIVIDUAL  
11:15AM 6 ATTORNEY-CLIENT BASIS BETWEEN MS. HOLMES AND THE BOIES SCHILLER  
11:15AM 7 FIRM. SUMMARIZE FOR ME WHAT THE BEST EVIDENCE IS THAT THE --  
11:15AM 8 FROM THE BEGINNING THAT THEY HAD AN ATTORNEY-CLIENT PRIVILEGE  
11:15AM 9 RELATIONSHIP THAT WAS AN INDIVIDUAL RATHER THAN A CORPORATE  
11:15AM 10 BASIS.

11:15AM 11 MR. WADE: THANK YOU, YOUR HONOR.

11:15AM 12 THE COURT: YES.

11:15AM 13 MR. WADE: AT THE BEGINNING OF THAT RELATIONSHIP  
11:15AM 14 WHEN BOIES SCHILLER WAS FIRST BROUGHT IN TO DO ANY WORK WITH  
11:16AM 15 RESPECT TO THERANOS OR MS. HOLMES, IT WAS IN CONNECTION WITH  
11:16AM 16 THE FUISZ LITIGATION IN WHICH IT JOINTLY REPRESENTED BOTH OUR  
11:16AM 17 CLIENT, ELIZABETH HOLMES, AND THE COMPANY.

11:16AM 18 CONTRARY TO WHAT THE GOVERNMENT SUGGESTED IN THEIR  
11:16AM 19 OPPOSITION BRIEF THAT WAS BECAUSE SHE WAS A PARTY IN INTEREST.  
11:16AM 20 IT DIDN'T RELATE TO SOME PARTICULAR PATENT DOCUMENT OR  
11:16AM 21 OTHERWISE. THERE ARE MANY OTHER INVENTORS TO THAT PATENT. SHE  
11:16AM 22 WAS AN INDIVIDUAL CLIENT, SHE HAD INDIVIDUAL INTERESTS THAT  
11:16AM 23 WERE COEXTENSIVE AND NOT IN CONFLICT WITH THE CORPORATION,  
11:16AM 24 WHICH IS NOT SURPRISING. SHE WAS AN INVENTOR ON MANY OF THE  
11:16AM 25 PATENTS. SHE WAS THE FOUNDER. SHE WAS THE CEO. SHE WAS A

11:16AM 1 CONTROLLING SHAREHOLDER.

11:16AM 2 SO THE FACT THAT THE INTERESTS ALIGNED IS NOT SURPRISING.

11:16AM 3 THAT REPRESENTATION CONTINUED FOR A NUMBER OF YEARS. IT  
11:16AM 4 WAS CONCEDEDLY A JOINT REPRESENTATION. THE BOIES SCHILLER FIRM  
11:16AM 5 APPEARED ON BEHALF OF MS. HOLMES IN THAT MATTER. THEY SIGNED  
11:17AM 6 PLEADINGS ON BEHALF OF MS. HOLMES IN THAT MATTER AS PART OF A  
11:17AM 7 JOINT REPRESENTATION, AND THEREAFTER THAT JOINT REPRESENTATION  
11:17AM 8 CONTINUED. THAT MATTER INVOLVED A LOT OF INTELLECTUAL PROPERTY  
11:17AM 9 MATTERS AND TRADE SECRET MATTERS.

11:17AM 10 AN OUTGROWTH OF THAT WAS A BROADER ASSESSMENT OF THE TRADE  
11:17AM 11 SECRET AND INTELLECTUAL PROPERTY MATTERS IN WHICH THERANOS HELD  
11:17AM 12 AN INTEREST AND MS. HOLMES HELD AN INTEREST, AND IT CONTINUED  
11:17AM 13 THEREAFTER.

11:17AM 14 WE'VE SET FORTH A NUMBER OF, A NUMBER OF DIFFERENT  
11:17AM 15 REPRESENTATIONS WITHIN OUR PLEADINGS BUT IT CONTINUED.

11:17AM 16 LET ME JUMP TO THE END. THE END OF THE REPRESENTATION IS  
11:17AM 17 IN THE FALL OF 2016 WHEN, AGAIN, THEY WERE IN THE -- THE  
11:17AM 18 COMPANY WAS IN THE MIDST OF A JOINT REPRESENTATION WITH  
11:17AM 19 MS. HOLMES, WITH THE COMPANY, AND IT WAS ONLY WHEN THEY CEASED  
11:18AM 20 BOTH REPRESENTATIONS THAT THE REPRESENTATION ENDED.

11:18AM 21 IN THAT PERIOD IN BETWEEN THERE WERE A NUMBER OF MATTERS  
11:18AM 22 ON WHICH BOIES SCHILLER WAS PROVIDING ADVICE IN CONNECTION WITH  
11:18AM 23 A JOINT REPRESENTATION WHERE INTERESTS WERE ALIGNED TO  
11:18AM 24 MS. HOLMES, THEY WERE PROVIDING THAT ADVICE TO MS. HOLMES AND  
11:18AM 25 TO THE COMPANY.

11:18AM 1 AND YOU DON'T HAVE TO TAKE MY WORD FOR IT, YOUR HONOR.

11:18AM 2 YOU CAN LOOK ON PAGE 3 OF OUR OPPOSITION THERE'S A STATEMENT

11:18AM 3 SMACK IN THE MIDDLE OF THIS, THESE REPRESENTATIONS WHERE THE

11:18AM 4 GENERAL COUNSEL OF THE COMPANY, HEATHER KING, AT THAT TIME ON

11:18AM 5 THE RECORD -- THERE'S A TRANSCRIPT OF IT IN A MEETING WITH

11:18AM 6 "THE WALL STREET JOURNAL" SAID TO "THE WALL STREET JOURNAL"

11:18AM 7 THAT DAVID BOIES WAS INTIMATELY INVOLVED WITH THE COMPANY AND

11:19AM 8 THAT HE HAD ADVISED ELIZABETH AND THE COMPANY ON AN ONGOING

11:19AM 9 BASIS.

11:19AM 10 NOW, MS. KING WAS WELL SITUATED TO HAVE THAT INFORMATION.

11:19AM 11 SHE WAS A FORMER BOIES SCHILLER PARTNER. SHE HAD WORKED FOR

11:19AM 12 THE COMPANY AND FOR MS. HOLMES BEFORE SHE BECAME THE GENERAL

11:19AM 13 COUNSEL, AND THEN SHE CONTINUED THEREAFTER.

11:19AM 14 SO IN THAT PERIOD IN BETWEEN THOSE TWO JOINT

11:19AM 15 REPRESENTATIONS, WE HAVE A CLEAR STATEMENT FROM THE GENERAL

11:19AM 16 COUNSEL OF THE COMPANY WITH CLOSE CONNECTION TO THE

11:19AM 17 BOIES SCHILLER FIRM AS TO JOINT REPRESENTATIONS.

11:19AM 18 THE COURT, QUOTE, "ADVISED ELIZABETH AND THE COMPANY,"

11:19AM 19 CLOSED QUOTE.

11:19AM 20 THE COURT: DID HER QUOTE INDICATE OR IS THERE SOME

11:19AM 21 CONTEXT TO INDICATE THAT IN REPRESENTING MS. HOLMES IT WAS IN

11:19AM 22 HER INDIVIDUAL CAPACITY AT THAT MOMENT AS COMPARED TO IN HER

11:19AM 23 ROLE AS THE CORPORATE REPRESENTATIVE?

11:20AM 24 MR. WADE: WELL, WE KNOW IT IS IN CONNECTION WITH

11:20AM 25 THE DECLARATION PROVIDED BY MS. HOLMES BECAUSE IN THIS VERY

11:20AM 1 PERIOD THE BOIES SCHILLER FIRM WAS CONSIDERING POTENTIAL LEGAL  
11:20AM 2 ACTION AGAINST "THE WALL STREET JOURNAL" ON BEHALF OF  
11:20AM 3 MS. HOLMES, AND THERE'S OTHER EVIDENCE THAT WE CAN SUBMIT IN  
11:20AM 4 CONNECTION WITH THAT.

11:20AM 5 I PAUSE BRIEFLY TO NOTE FOR THE COURT, OBVIOUSLY WHEN  
11:20AM 6 YOU'RE LITIGATING A PRIVILEGE ISSUE WITH YOUR ADVERSARY WITHIN  
11:20AM 7 THE SAME PROCEEDING THERE ARE LIMITATIONS IN TERMS OF THE  
11:20AM 8 AMOUNT OF CONTEXT AND INFORMATION THAT WE CAN PROVIDE TO  
11:20AM 9 CLARIFY THE JOINT REPRESENTATION.

11:20AM 10 WE DON'T WANT TO WAIVE PRIVILEGE. BUT AS WE'VE NOTED IN  
11:20AM 11 OUR BRIEF, TO THE EXTENT THAT THE COURT BELIEVES THAT NECESSARY  
11:20AM 12 IN THIS MATTER, WE COULD SUBMIT THAT EX PARTE IN CAMERA SO THE  
11:20AM 13 COURT CAN SEE THAT INFORMATION.

11:20AM 14 FOR EXAMPLE, WE CAN'T DESCRIBE OTHER PRIVILEGE  
11:20AM 15 COMMUNICATIONS THAT MIGHT BEAR ON THESE QUESTIONS WITHOUT  
11:20AM 16 WAIVING THE PRIVILEGE, AND OBVIOUSLY WE DON'T INTEND TO DO  
11:21AM 17 THAT.

11:21AM 18 THE COURT: YES. YOU REFERENCE A FOOTNOTE IN YOUR  
11:21AM 19 BRIEF SUGGESTING THAT THERE MIGHT BE SOME IN CAMERA REVIEW OF  
11:21AM 20 SOME ADDITIONAL MATERIALS WITHOUT COMPELLING DISCLOSURE OF WHAT  
11:21AM 21 YOU'RE GOING TO POTENTIALLY GOING TO SUBMIT.

11:21AM 22 CAN YOU GIVE ME A LITTLE MORE INFORMATION ABOUT THE VOLUME  
11:21AM 23 OF WHAT YOU PLAN TO PROVIDE FOR IN CAMERA AND HOW THAT WOULD BE  
11:21AM 24 HELPFUL TO THE COURT? IF YOU CAN GIVE ME A LITTLE MORE SHAPE  
11:21AM 25 TO WHAT I MIGHT LOOK AT.

1 OF COURSE, MANY TIMES THE COURT RESOLVES ISSUES LIKE THIS  
2 WITHOUT DOING IN CAMERA REVIEW, BUT IT CAN BE A WAY TO HELP  
3 UNDERSTAND AND ASSESS THE PRIVILEGE.

4 SO TELL ME MORE ABOUT WHAT YOU WOULD PROVIDE IF I AGREED  
5 TO IT.

6 MR. WADE: WELL, FOR ONE, WE CAN PROVIDE SOME OF THE  
7 COMMUNICATIONS THAT ARE AT ISSUE AND NOT WAIVE THEM IF THE  
8 COURT REQUESTED THEM TO BE SUBMITTED.

9 IT'S AMBIGUOUS, I THINK, IN THE NINTH CIRCUIT AS TO  
10 WHETHER WE NEED DIRECTION FROM THE COURT TO SUBMIT THEM TO  
11 PROTECT US FROM THE WAIVER OR WHETHER WE CAN DO THAT  
12 VOLUNTARILY. SO WE DIDN'T WANT TO DO IT WITHOUT A DIRECTION  
13 FROM THE COURT TO MAKE SURE WE DON'T WAIVE THE PRIVILEGE.

14 AS THE COURT CAN TELL, WE'RE CONSERVATIVE IN THAT REGARD.

15 BUT MORE GENERALLY, THERE ARE OTHER COMMUNICATIONS THAT  
16 ARE PRIVILEGED THAT HAVE LANGUAGE THAT WE THINK, YOU KNOW,  
17 CONFIRM OUR GENERAL ARGUMENT AND OUR FRAME.

18 PART OF THAT IS, YOUR HONOR, AND THE VOLUME TO THAT POINT,  
19 YOUR HONOR, BECAUSE I KNOW SOMETIMES COURTS IN YOUR POSITION  
20 GET STUCK WITH A LABORIOUS TASK.

21 FORTUNATELY, FOR ALL OF US WE'RE TALKING ABOUT 13  
22 DOCUMENTS HERE, MANY OF THEM RELATE, FRANKLY, MANY OF THEM  
23 RELATE TO THAT DISPUTE, POTENTIAL DISPUTE WITH "THE WALL STREET  
24 JOURNAL," AND SO THAT'S THE VAST MAJORITY OF THE COMMUNICATIONS  
25 ON HERE. AND THEN THERE ARE A COUPLE OF OTHERS.

11:22AM 1 IT WOULD NOT BE AN EXTENSIVE SUBMISSION, BUT WE THINK IT  
11:22AM 2 WOULD BE HELPFUL TO THE COURT. AND WE THINK WHY IT'S  
11:23AM 3 APPROPRIATE HERE, YOUR HONOR, IS THIS -- THE ASSESSMENT OF THE  
11:23AM 4 JOINT PRIVILEGE IN THIS CONTEXT, WHEN YOU LOOK AT TELEGLOBE AND  
11:23AM 5 YOU LOOK AT SOME OF THE OTHER CASES THAT TALK ABOUT THE JOINT  
11:23AM 6 REPRESENTATION AND WHETHER THE JOINT REPRESENTATION CONTINUES,  
11:23AM 7 IT'S CLEAR THAT CONTEXT MATTERS IN CONNECTION WITH THAT.

11:23AM 8 THIS IS NOT A BEVILL OR A GRAF CASE WHERE THE QUESTION IS  
11:23AM 9 WAS THERE EVER AN ATTORNEY-CLIENT RELATIONSHIP WHERE THE  
11:23AM 10 QUESTION IN THOSE CASES IS ABOUT THE FORMATION.

11:23AM 11 WE KNOW ABOUT THE FORMATION. THE FORMATION IS ESSENTIALLY  
11:23AM 12 UNDISPUTED.

11:23AM 13 THE QUESTION IS THE SCOPE. AND IN CONNECTION WITH THAT  
11:23AM 14 SCOPE AND WHETHER THE JOINT REPRESENTATION CEASED, THERE ARE  
11:23AM 15 OTHER FACTORS THAT ARE TO BE CONSIDERED. SOME OF THOSE FACTORS  
11:23AM 16 ARE HARD TO CONSIDER WITHOUT PROVIDING SOME PRIVILEGED  
11:23AM 17 INFORMATION.

11:23AM 18 THE COURT: ALL RIGHT. LET ME PAUSE THERE,  
11:23AM 19 MR. WADE, AND GIVE MR. BOSTIC A CHANCE TO ADDRESS TWO THINGS,  
11:24AM 20 MR. BOSTIC, IN WHICHEVER ORDER YOU WANT. ONE IS THE PROCEDURAL  
11:24AM 21 OPTION OF HAVING THE COURT RECEIVE IN CAMERA ADDITIONAL  
11:24AM 22 MATERIALS FROM THE DEFENSE FOR ME TO REVIEW.

11:24AM 23 AND THEN SECONDLY IS YOUR VIEW ABOUT KIND OF IN RESPONSE  
11:24AM 24 TO WHETHER THE PRIVILEGE IS INDIVIDUALLY HELD BY MS. HOLMES OR  
11:24AM 25 JOINT IN RESPONSE TO WHAT MR. WADE HAS ARGUED.

MR. BOSTIC: THANK YOU, YOUR HONOR. I'LL START WITH THE SECOND AND THEN MOVE TO THE FIRST IF THAT'S ALL RIGHT.

SO I THINK THAT WE NEED TO START WITH THE DEFAULT UNDER THE LAW IN THESE SITUATIONS WHERE A CORPORATE OFFICER SPEAKS TO LAWYERS HIRED BY THE COMPANY.

THE DEFAULT IS, UNDER THE NINTH CIRCUIT AND UNDER THE THIRD CIRCUIT, THAT ANY PRIVILEGE THAT EXISTS AS TO A CORPORATE OFFICER'S ROLE AND FUNCTIONS WITHIN A COMPANY BELONGS TO THE CORPORATION AND NOT THE OFFICER.

SO BECAUSE THIS CAN BE A COMPLICATED SITUATION WHERE A CORPORATE OFFICER SPEAKS TO COMPANY COUNSEL, IT CAN CREATE CONFUSION ABOUT WHO THE CLIENT IS AND WHO THE PRIVILEGE BELONGS TO. WE HAD THAT DEFAULT TEST OR THAT DEFAULT STANDARD AND THE GRAF TEST IS VERY CLEAR IN LAYING OUT THE REQUIREMENTS FOR A CORPORATE OFFICER TO CLAIM INDIVIDUAL PRIVILEGE OVER THAT KIND OF COMMUNICATION.

AS THE COURT CAN SEE FROM THAT STANDARD, IT'S SET UP TO MAKE IT CHALLENGING FOR THAT CORPORATE OFFICER TO MAKE THAT SHOWING, THE SHOWING REQUIRED TO ASSERT THAT INDIVIDUAL PRIVILEGE.

HERE THE DEFENSE WANTS TO IGNORE THAT STANDARD AND INSTEAD RELY ON GENERAL CASE LAW ABOUT JOINT REPRESENTATIONS, BUT THOSE CASES CITED BY THE DEFENSE ARE OF LIMITED USEFULNESS HERE BECAUSE THEY DON'T MAKE ANY ATTEMPT TO NAVIGATE THIS COMPLICATED SITUATION, THE CHALLENGING SITUATION OF WHEN A



1 CORPORATE OFFICER IS SPEAKING TO COMPANY COUNSEL, AND IT MIGHT  
2 BE UNCLEAR WHETHER THAT CORPORATE OFFICER IS SPEAKING IN HIS OR  
3 HER INDIVIDUAL CAPACITY OR SIMPLY AS A CORPORATE  
4 REPRESENTATIVE.

5 AND I SAY THAT'S A CHALLENGING SITUATION. AT LEAST IT  
6 WOULD BE A CHALLENGING SITUATION IF IT WEREN'T FOR THIS VERY  
7 CLEAR GRAF TEST THAT LAYS OUT SIMPLE ELEMENTS THAT IS INCUMBENT  
8 ON THAT CORPORATE OFFICER TO SATISFY.

9 SO I THINK IT'S IMPORTANT TO REMEMBER THE NINTH CIRCUIT IN  
10 THE RUEHLE CASE TELLS US THAT THE PARTY ASSERTING THE PRIVILEGE  
11 HAS THE BURDEN OF ESTABLISHING FIRST THE EXISTENCE OF THE  
12 RELATIONSHIP AND THEN ALSO THE PRIVILEGED NATURE OF THE  
13 COMMUNICATIONS.

14 SO I HEAR THE COURT ASKING ABOUT THE RELATIONSHIP ITSELF.  
15 SO LET'S START THERE.

16 I THINK THE KEY FACTS HERE ARE THAT THE BOIES SCHILLER  
17 FIRM, YES, REPRESENTED AND ADVISED THERANOS ON A VARIETY OF  
18 MATTERS. THAT'S CLEAR. THAT'S NOT DISPUTED.

19 IT IS DISPUTED, THOUGH, THAT THERE WAS A CLEAR AND JOINT  
20 REPRESENTATION HERE AT ANY TIME.

21 IN RESPONSE TO HER BURDEN OR IN HER ATTEMPT TO SATISFY HER  
22 BURDEN, THE DEFENDANT HAS SUBMITTED SOME GENERALIZED STATEMENTS  
23 ABOUT THAT RELATIONSHIP, BUT SHE DOESN'T CLAIM THAT SHE EVER  
24 MADE IT CLEAR TO BOIES SCHILLER ON A SINGLE OCCASION THAT SHE  
25 WAS SEEKING THE FIRM'S ADVICE IN HER INDIVIDUAL CAPACITY.

11:27AM 1 SHE NEVER CLAIMS THAT THE FIRM EXPRESSLY AGREED TO  
11:27AM 2 REPRESENT HER IN HER INDIVIDUAL CAPACITY.

11:27AM 3 SHE NEVER CLAIMS THAT SHE ENTERED INTO AN INDIVIDUAL  
11:27AM 4 RETAINER AGREEMENT WITH THE FIRM. IN FACT, DOESN'T REMEMBER  
11:27AM 5 AND CAN'T PRODUCE ANY RETAINER AGREEMENT AT ALL. THAT FACTOR  
11:27AM 6 IS RELEVANT TO THE NINTH CIRCUIT IN THE GRAF CASE.

11:27AM 7 THE DEFENDANT DOESN'T CLAIM TO HAVE EVER PAID A SINGLE  
11:27AM 8 DOLLAR TO BOIES SCHILLER IN HER PERSONAL CAPACITY. THAT LEAVES  
11:27AM 9 THE COURT I THINK TO REASONABLY ASSUME THAT THERANOS ITSELF  
11:27AM 10 PAID FOR THIS REPRESENTATION. THAT FACTOR WAS ALSO RELEVANT IN  
11:27AM 11 THE GRAF OPINION.

11:27AM 12 IT'S ALSO IMPORTANT NOT TO LOSE SIGHT OF THE FACT THAT THE  
11:27AM 13 FIRM ITSELF INFORMS DEFENSE COUNSEL IN CONNECTION WITH THIS  
11:27AM 14 CASE THAT ITS UNDERSTANDING WAS THAT IT NEVER REPRESENTED  
11:27AM 15 HOLMES INDIVIDUALLY, AND THE GOVERNMENT HAS SUBMITTED THAT  
11:27AM 16 COMMUNICATION TO THE COURT FOR THE COURT'S REVIEW. THAT IS  
11:27AM 17 ARGUABLY DISPOSITIVE AS TO FACTOR NUMBER 3 IN GRAF REQUIRING  
11:28AM 18 THAT THE LAWYER ACTUALLY AGREE TO REPRESENT THE INDIVIDUAL  
11:28AM 19 DEFENDANT IN THAT PERSONAL CAPACITY.

11:28AM 20 ANY STATEMENT BY HEATHER KING COULD NOT CHANGE THOSE  
11:28AM 21 FACTS. AND, IN FACT, IF THE COURT REVIEWS THAT LANGUAGE, THE  
11:28AM 22 ACTUAL LANGUAGE OF MS. KING'S STATEMENT, I THINK THE COURT WILL  
11:28AM 23 SEE THAT THAT'S NOT CLEARLY ASSERTING AN INDIVIDUAL  
11:28AM 24 ATTORNEY-CLIENT RELATIONSHIP BETWEEN HOLMES AND BOIES SCHILLER.  
11:28AM 25 BUT EVEN IF IT DID, THAT WOULDN'T MATTER HERE. HEATHER KING

11:28AM 1 WOULD BE OUTSIDE OF THAT RELATIONSHIP, AND IT WOULD HAVE NO  
11:28AM 2 EFFECT ON HOLMES'S FAILURE TO SHOW THE ELEMENTS AND THE FACTORS  
11:28AM 3 THAT I'VE JUST LISTED.

11:28AM 4 SIMILARLY, HOLMES'S SUBJECTIVE UNDERSTANDING DOESN'T  
11:28AM 5 MATTER HERE. I THINK THE GOVERNMENT CITED THE CASE LAW SHOWING  
11:28AM 6 THAT.

11:28AM 7 SO WE'RE LEFT WITH THE DEFENSE ASKING THE COURT TO ASSUME  
11:28AM 8 OR INFER FROM SOME PLEADINGS WHERE BOIES SCHILLER SIGNED ON  
11:28AM 9 BEHALF OF THERANOS AND HOLMES THAT THERE WAS A LONGSTANDING  
11:29AM 10 JOINT REPRESENTATION THAT SPANNED A VARIETY OF MATTERS, BUT THE  
11:29AM 11 EVIDENCE DOESN'T SHOW THAT.

11:29AM 12 AS TO THE FUISZ LITIGATION, THAT SUIT WAS BROUGHT BY THE  
11:29AM 13 COMPANY, OF COURSE. HOLMES WAS ALSO A PLAINTIFF. IT APPEARS  
11:29AM 14 THAT PATENT LAW MIGHT HAVE REQUIRED OR AT LEAST AUGURED IN  
11:29AM 15 FAVOR OF JOINING HOLMES AS A COPLAINTIFF THERE.

11:29AM 16 I'LL ALSO NOTE THAT ACCORDING TO THAT COMPLAINT, HOLMES  
11:29AM 17 HAD ASSIGNED SOME RIGHTS TO THE COMPANY. SO IT'S UNCLEAR THAT  
11:29AM 18 SHE WOULD HAVE RECOVERED PERSONALLY IN THAT CASE.

11:29AM 19 ALL OF THIS JUST GOES TO THE POINT THAT TO THE EXTENT THAT  
11:29AM 20 BOIES SCHILLER APPEARED FOR OR REPRESENTED HOLMES IN CONNECTION  
11:29AM 21 WITH THAT LITIGATION, IT REALLY APPEARS THAT THAT  
11:29AM 22 REPRESENTATION WAS INCIDENTAL TO ITS OVERALL REPRESENTATION OF  
11:29AM 23 THE COMPANY.

11:29AM 24 SO IF THAT'S THE CASE, IT SHOULD NOT BE RELIED UPON AS A  
11:29AM 25 SIGNAL OF THE BEGINNING OF A LONG-TERM JOINT REPRESENTATION

11:29AM 1 THAT --

11:29AM 2 THE COURT: MR. BOSTIC, SORRY FOR INTERRUPTING.

11:29AM 3 WHAT IS THE TEST FOR -- WHEN YOU SAY IT'S INCIDENTAL? HOW DO I  
11:30AM 4 REACH THAT CONCLUSION? IS THERE SOME CASE LAW THAT SAYS HERE'S  
11:30AM 5 HOW YOU TELL IF SOME REPRESENTATION IS INCIDENTAL OR NOT, OR IS  
11:30AM 6 IT JUST A COMMON SENSE TEST?

11:30AM 7 MR. BOSTIC: I WOULD SAY IT'S A COMMON SENSE TEST,  
11:30AM 8 YOUR HONOR. I DON'T HAVE A CASE TO CITE ON THAT. I THINK WHAT  
11:30AM 9 WE'RE LEFT TO DO IS LOOK AT THE EVIDENCE THAT THE DEFENSE HAS  
11:30AM 10 SUBMITTED. IT IS THE DEFENSE'S BURDEN. WE ARE LEFT TO LOOK AT  
11:30AM 11 THAT AND I THINK INFER WHAT WE CAN.

11:30AM 12 BUT MY MAIN POINT IS THAT IT WOULD BE SEVERAL STEPS TOO  
11:30AM 13 FAR TO INFER FROM WHAT THE DEFENSE HAS PUT IN FRONT OF THE  
11:30AM 14 COURT THAT THIS WAS THE BEGINNING OF A FULL INDIVIDUAL OR JOINT  
11:30AM 15 REPRESENTATION THAT INCLUDED ELIZABETH HOLMES IN HER PERSONAL  
11:30AM 16 CAPACITY.

11:30AM 17 THE COURT: MR. WADE WILL MAKE THE ARGUMENTS ON HIS  
11:30AM 18 CLIENT'S BEHALF, BUT SHE WAS A NAMED PARTY IN THAT LITIGATION  
11:30AM 19 AND WAS ASSERTING INTELLECTUAL PROPERTY RIGHTS. IT APPEARS ON  
11:30AM 20 A PERSONAL BASIS THEY WERE HER RIGHTS, AND THEY WERE RIGHTS  
11:30AM 21 THAT THE COMPANY ALSO HELD, BUT THEY WERE RIGHTS THAT SHE WAS  
11:30AM 22 ASSERTING IN THAT CASE AND THAT, YOU KNOW, AS TO YOUR ARGUMENT,  
11:31AM 23 THAT WAS INCIDENTAL TO THE CASE.

11:31AM 24 YOU KNOW, I HEAR THE ARGUMENT ON THE OTHER SIDE WHICH IS,  
11:31AM 25 NO, THAT WASN'T INCIDENTAL, THAT WAS A SUBSTANTIAL

1 REPRESENTATION OF HER INDIVIDUAL RIGHTS WHERE COUNSEL WAS  
2 COMMUNICATING WITH HER ABOUT THAT.

3 ALL RIGHT.

4 IF YOU CAN -- I'LL CONSIDER YOUR ARGUMENTS. ADDRESS THE  
5 ISSUE OF POTENTIAL IN CAMERA REVIEW AND THE PROS AND CONS TO  
6 LOOKING AT THOSE MATERIALS.

7 MR. BOSTIC: YES, YOUR HONOR.

8 IF I COULD JUST VERY BRIEFLY ON THE COURT'S LAST POINT.  
9 THE COURT ACTUALLY DOES NOT NEED TO DECIDE THE QUESTION OF  
10 WHETHER THAT REPRESENTATION IN CONNECTION WITH THE FUISZ  
11 LITIGATION WAS TRULY JOINT OR NOT, BECAUSE IN THIS CASE THE  
12 COMMUNICATIONS AT ISSUE, THERE'S NO CLAIM BY THE DEFENSE THAT  
13 THEY ACTUALLY RELATED TO THAT MATTER.

14 THE CASE LAW TELLS US THAT TO THE EXTENT THERE IS A JOINT  
15 REPRESENTATION, IT IS MATTER SPECIFIC. IT CANNOT BE THE CASE  
16 THAT A PAST JOINT REPRESENTATION, EVEN IF IT WOULD CREATE THAT  
17 INDIVIDUAL ATTORNEY-CLIENT RELATIONSHIP, THE CASE LAW DOESN'T  
18 SUPPORT THE IDEA THAT THAT WOULD THEN AUTOMATICALLY CREATE ALL  
19 ADDITIONAL, OR SORRY, THAT THAT WOULD CONVERT FUTURE ADDITIONAL  
20 ENGAGEMENTS INTO JOINT ONES THAT WOULD PRESERVE THAT  
21 RELATIONSHIP.

22 I HAVE SOME ADDITIONAL POINTS TO MAKE ABOUT THE INDIVIDUAL  
23 COMMUNICATIONS HERE, BUT FIRST LET ME ADDRESS THE COURT'S  
24 QUESTION ABOUT ADDITIONAL SUBMISSION OF IN CAMERA MATERIALS.

25 THE CASE LAW IS CLEAR THAT THE DEFENSE HAS THE BURDEN TO

11:32AM 1 MAKE THE REQUIRED SHOWING. THAT BURDEN HAS BEEN SQUARELY WITH  
11:32AM 2 THE DEFENSE THIS ENTIRE TIME.

11:32AM 3 THE GOVERNMENT'S POSITION IS THAT THE DEFENSE SHOULD HAVE  
11:32AM 4 SUBMITTED ALL OF THE EVIDENCE THAT IT NEEDED TO MAKE THE  
11:32AM 5 SHOWING BY THIS TIME. SO THE GOVERNMENT WOULD OBJECT TO  
11:32AM 6 ADDITIONAL SUBMISSIONS AFTER THIS FACT. EVEN IF THE GOVERNMENT  
11:32AM 7 IS NOT ENTITLED TO ACTUALLY SEE WHAT IS SUBMITTED IN CAMERA,  
11:32AM 8 THE GOVERNMENT HAS A RIGHT, I THINK REASONABLY, TO HEAR THE  
11:32AM 9 DEFENSE'S ARGUMENTS ABOUT THOSE SUBMISSIONS AND TO BE PART OF  
11:32AM 10 THAT CONVERSATION.

11:33AM 11 THE COURT: ALL RIGHT. THANK YOU.

11:33AM 12 ON THE ISSUE OF IN CAMERA REVIEW, I DETERMINED IT WOULD BE  
11:33AM 13 HELPFUL FOR MY EVALUATION OF THE PRIVILEGE AND THE SCOPE OF THE  
11:33AM 14 PRIVILEGE TO REVIEW THOSE MATERIALS.

11:33AM 15 ONE OF THE FACTORS THE COURT CONSIDERS IN DOING THAT IS  
11:33AM 16 THE VOLUME AND JUST THE ADMINISTRATIVE ASPECT OF WILL I BE ABLE  
11:33AM 17 TO REVIEW IT IN A TIMELY WAY SO THAT IT WILL BE HELPFUL FOR ME  
11:33AM 18 TO MAKE MY DECISION?

11:33AM 19 AND MR. WADE HAS PROFFERED THAT THE VOLUME WILL NOT BE  
11:33AM 20 DISABLING AND WILL NOT CAUSE A DELAY IN THE CASE.

11:33AM 21 AND THE ADVANTAGE OF JUDGE DAVILA HAVING REFERRED THE  
11:33AM 22 MATTER TO ME IS THAT THERE'S NOT A DANGER OF, YOU KNOW, OF  
11:33AM 23 INFLECTION OF THE TRIAL JUDGE WITH SOMETHING THAT IS PRIVILEGED  
11:33AM 24 AND CONFIDENTIAL THAT WOULD CAUSE HIM TO BE UNFAIR IN HIS TRIAL  
11:33AM 25 AND POTENTIAL SENTENCING OF THE CASE. I CAN LOOK AT THE

11:33AM 1 MATERIALS IN CAMERA WITHOUT CONCERN THAT THEY WILL IMPACT  
11:33AM 2 JUDGE DAVILA'S RULINGS ONE WAY OR THE OTHER.

11:34AM 3 I DON'T FIND THE DEFENSE HAS WAIVED THIS ARGUMENT. THEY  
11:34AM 4 RAISED IT IN THEIR BRIEF THAT THEY PROPOSED MY LOOKING AT IT,  
11:34AM 5 AND I JUST WANTED TO GET MORE CONTEXT FOR THAT PROPOSAL BEFORE  
11:34AM 6 ORDERING IT.

11:34AM 7 SO, MR. WADE, I DO GRANT YOU LEAVE TO PROVIDE THE  
11:34AM 8 MATERIALS EX PARTE FOR IN CAMERA REVIEW. AND BY SUGGESTING  
11:34AM 9 THAT THEY ARE EX PARTE MY -- MR. BALWANI, OF COURSE, IS A  
11:34AM 10 CODEFENDANT IN THE CASE. HE'S NOT A PARTY TO THE ARGUMENTS  
11:34AM 11 HERE ABOUT EVIDENTIARY PRIVILEGES, BUT MY SUGGESTION WOULD BE  
11:34AM 12 IS THAT THIS IS COMING TO THE COURT AND NOT TO THE CODEFENDANT  
11:34AM 13 OR NOT TO THE GOVERNMENT. I WON'T PROVIDE IT TO JUDGE DAVILA  
11:34AM 14 WITHOUT ANY FURTHER COURT ORDER AND OPPORTUNITY TO RESPOND.

11:34AM 15 DO THOSE LIMITATIONS MAKE SENSE TO YOU?

11:34AM 16 MR. WADE: THAT MAKES SENSE, YOUR HONOR.

11:34AM 17 IF I MIGHT WHEN APPROPRIATE, I WILL ALSO RESPOND BRIEFLY  
11:34AM 18 TO MR. BOSTIC'S ARGUMENT.

11:34AM 19 THE COURT: ALL RIGHT. FIRST TELL ME WHEN YOU'LL  
11:35AM 20 GET THOSE MATERIALS TO ME.

11:35AM 21 MR. WADE: WHEN WOULD THE COURT LIKE THEM?

11:35AM 22 THE COURT: WHENEVER. AS SOON AS YOU CAN REASONABLY  
11:35AM 23 GET THEM.

11:35AM 24 IF THEY'RE COMING ELECTRONICALLY, THEY CAN COME TO MY  
11:35AM 25 COURTROOM DEPUTY, AND YOU CAN COMMUNICATE WITH HER AS TO

11:35AM 1 PROVIDING THEM.

11:35AM 2 IF THEY'RE COMING IN PAPER FORM, YOU CAN PROVIDE THEM TO  
11:35AM 3 THE COURTHOUSE IN SAN JOSE, AND I'LL PICK THEM UP THERE.

11:35AM 4 MR. WADE: YOUR HONOR, MAYBE BOTH FOR CONVENIENCE  
11:35AM 5 AND TO MAKE SURE THE RECORD IS CLEAR, WE WILL TRANSMIT THEM TO  
11:35AM 6 CHAMBERS ELECTRONICALLY PERHAPS MORE QUICKLY AND THEN GET THEM  
11:35AM 7 ON FILE IN A MORE FORMAL WAY WITH THE COURT SO THERE'S A RECORD  
11:35AM 8 OF THE FILING IN THE DOCKET.

11:35AM 9 THE COURT: THAT SOUNDS GOOD.

11:35AM 10 IS FRIDAY DOABLE?

11:35AM 11 MR. WADE: COULD WE HAVE UNTIL MONDAY, YOUR HONOR?

11:35AM 12 THE COURT: SURE.

11:35AM 13 MR. WADE: THANK YOU.

11:35AM 14 THE COURT: SO WE'LL ANTICIPATE RECEIVING SOME IN  
11:36AM 15 CAMERA MATERIALS BY MONDAY, THE 21ST. AND WE'LL DOCUMENT WHEN  
11:36AM 16 WE RECEIVE THEM, AND SO THAT WILL BE IN THE RECORD.

11:36AM 17 ALL RIGHT. MR. WADE, YOU WANTED TO RESPOND FURTHER TO  
11:36AM 18 MR. BOSTIC'S ARGUMENTS. GO AHEAD.

11:36AM 19 MR. WADE: I DID, YOUR HONOR. FIRST OF ALL, THERE'S  
11:36AM 20 NO INCIDENTAL ATTORNEY-CLIENT PRIVILEGE, ATTORNEY-CLIENT  
11:36AM 21 RELATIONSHIP.

11:36AM 22 AS A LAWYER I EITHER HAVE OBLIGATIONS TO A CLIENT OR I  
11:36AM 23 DON'T. THERE'S NO SUCH THING IN THE LAW, THAT I'M AWARE OF, OF  
11:36AM 24 AN INCIDENTAL ATTORNEY-CLIENT RELATIONSHIP.

11:36AM 25 MR. BOSTIC'S ARGUMENT SORT OF DEMONSTRATES THE FAILURES OF



11:36AM 1 GRAF IN THIS CASE BECAUSE MR. BOSTIC IS SUGGESTING THAT WE  
11:36AM 2 SHOULD USE THE TEST SET FORTH IN GRAF TO DEFEAT WHAT WAS  
11:36AM 3 CLEARLY A JOINT REPRESENTATION BECAUSE THERE IS NOT EVIDENCE TO  
11:36AM 4 MEET THE GRAF STANDARD NECESSARILY IN CONNECTION WITH THE  
11:36AM 5 MATTER IN WHICH MS. HOLMES WAS REPRESENTED IN LITIGATION WHERE  
11:36AM 6 THEY SIGNED PLEADINGS, WHERE THINGS WERE SUBMITTED TO THE COURT  
11:37AM 7 ON HER BEHALF, THEY ENTERED INTO AN APPEARANCE PURSUANT TO THE  
11:37AM 8 NORTHERN DISTRICT OF CALIFORNIA RULES.

11:37AM 9 YOUR HONOR, THEY DID THAT IN A MANNER THAT WAS NOT JUST A  
11:37AM 10 PATENT MATTER. THAT INVOLVED ALLEGED THEFT OF TRADE SECRETS  
11:37AM 11 AND OTHER MATTERS THAT WERE MUCH BROADER THAN PATENT MATTERS.

11:37AM 12 SECONDLY, ON BEHALF OF, ON BEHALF OF MS. HOLMES, THE  
11:37AM 13 BOIES SCHILLER FIRM IN A RELATED MATTER ACTUALLY FILED  
11:37AM 14 LITIGATION AGAINST MCDERMOTT, WILL & EMERY IN A LEGAL  
11:37AM 15 MALPRACTICE MATTER IN THE DISTRICT OF COLUMBIA. AGAIN, NOT A  
11:37AM 16 PATENT MATTER. A MATTER THAT WAS AN OUTGROWTH OF THAT AND  
11:37AM 17 REFLECTS THE NATURE OF THE JOINT RELATIONSHIP WHICH CONTINUED.

11:37AM 18 AND CONTRARY TO THE SUGGESTION OF COUNSEL, WE DON'T HAVE  
11:37AM 19 TO LOOK JUST TO THOSE REPRESENTATIONS. YOU CAN LOOK TO THE  
11:37AM 20 EXPLANATION PROVIDED BY MS. HOLMES IN HER DECLARATION.

11:37AM 21 ALTHOUGH WE WILL SUBMIT ADDITIONAL INFORMATION TO THE  
11:38AM 22 COURT IN CAMERA. SHE SETS THE CONTEXT FOR THE ADVICE THAT WAS  
11:38AM 23 PROVIDED IN DIFFERENT MATTERS. THAT ADVICE WAS PROVIDED IN  
11:38AM 24 CONNECTION WITH AN ONGOING JOINT REPRESENTATION, AND SHE MAKES  
11:38AM 25 CLEAR THAT THERE WAS NEVER ANY INDICATION AT ANY TIME FROM THE

1 START OF THE REPRESENTATION TO THE END THAT THE REPRESENTATION  
2 WAS LIMITED IN ANY WAY.

3 AND IT WOULD BE UNFAIR TO TAKE A GRAF TEST WHICH IF YOU  
4 LOOK AT THE FACTS OF GRAF, YOU'RE TALKING IN GRAF WHICH, YOU  
5 KNOW, IT TOOK SEVERAL BITES AT THE APPLE FOR THE COURT TO EVEN  
6 CONSIDER THE BEVILL TEST, THE NINTH CIRCUIT TO EVEN CONSIDER  
7 THE BEVILL TEST.

8 BUT WHEN YOU LOOK AT GRAF, THE FACTS ARE SO FAR FROM THIS  
9 CASE IS TO DEMONSTRATE THE BAD FIT TO THESE FACTS WHERE THERE  
10 WAS A LONGSTANDING JOINT REPRESENTATION IN ADVANCE OF THE  
11 COMMUNICATIONS THAT ARE AT ISSUE HERE. IN THAT CASE THE PERSON  
12 WASN'T EVEN AN EMPLOYEE OF THE COMPANY.

13 SO WE SHOULDN'T SLAVISHLY ADHERE TO SOME MULTIFACTOR TEST  
14 THAT IS SET FORTH IN THE NINTH CIRCUIT IF IT DOESN'T FIT TO THE  
15 FACTS OF THE CASE.

16 HERE IT DOESN'T. WE HAVE A CLEAR BOOK ENDED JOINT  
17 REPRESENTATIONS THAT ARE DEMONSTRATED BY MULTIPLE  
18 REPRESENTATION IN CONNECTION WITH MULTIPLE LITIGATION MATTERS  
19 AND THE LAW IS CLEAR, AS WE'VE CITED IN OUR BRIEF, THAT THAT  
20 PRESUMPTIVELY -- THAT IS PRESUMPTIVE EVIDENCE ESTABLISHING AN  
21 ATTORNEY-CLIENT RELATIONSHIP WITH RESPECT TO MS. HOLMES, IT'S A  
22 JOINT REPRESENTATION, AND THEN WE NEED TO GO BACK TO TELEGLOBE  
23 AND LOOK AT THE FACTORS SET FORTH IN TELEGLOBE WHICH MANY  
24 DISTRICT COURTS IN THIS CIRCUIT HAVE CITED FAVORABLY AND A  
25 COUPLE OF DISTRICT COURT OF CALIFORNIA CASES OR DISTRICT OF

11:40AM 1 ARIZONA CASES, AND I THINK THE NINTH CIRCUIT HAS CITED IT  
11:40AM 2 FAVORABLY ONCE.

11:40AM 3 JOINT REPRESENTATION IS THE VEHICLE THROUGH WHICH TO  
11:40AM 4 ASSESS THESE OTHER COMMUNICATIONS, AND AS IT RELATES TO THAT  
11:40AM 5 WHOLE, IF YOU WILL, WHICH IS NOT -- WHICH COMES BETWEEN THE  
11:40AM 6 TWO -- THE FORMAL LITIGATION MATTERS, WE HAVE MS. HOLMES'S  
11:40AM 7 DECLARATION, WE HAVE MS. KING'S STATEMENT, WHICH CONFIRMS THAT  
11:40AM 8 DECLARATION, AND THERE WILL BE OTHER EVIDENCE SUBMITTED TO THE  
11:40AM 9 COURT.

11:40AM 10 THE COURT: THANK YOU, MR. WADE.

11:40AM 11 MR. BOSTIC, I'LL GIVE YOU YOUR FINAL WORD AT THIS STAGE OF  
11:40AM 12 THE PROCEEDINGS.

11:40AM 13 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:40AM 14 SO I THINK UNDER TELEGLOBE ITSELF, THOUGH, WHICH BY THE  
11:40AM 15 WAY CAUTIONS NOT TO OVERLY MECHANICALLY APPLY THE LABEL OF  
11:40AM 16 JOINT REPRESENTATION, UNDER TELEGLOBE IT'S CLEAR THAT WHETHER A  
11:41AM 17 REPRESENTATION EXISTS IS DETERMINED ON A MATTER-BY-MATTER  
11:41AM 18 BASIS.

11:41AM 19 IT IS NOT THE CASE THAT BECAUSE A FIRM REPRESENTED AN  
11:41AM 20 INDIVIDUAL ONCE THAT EVERY ADDITIONAL CONTACT BETWEEN THAT  
11:41AM 21 INDIVIDUAL AND THAT FIRM BECOMES PART OF THAT SAME JOINT  
11:41AM 22 REPRESENTATION.

11:41AM 23 IN FACT, IT'S CLEAR HERE THAT THE FUISZ LITIGATION ENDED  
11:41AM 24 IN THE FIRST QUARTER OF 2014. THE TOY CLASS ACTION, WHICH IS  
11:41AM 25 ALSO REFERENCED BY THE DEFENSE, DIDN'T BEGIN OR AT LEAST THE

11:41AM 1 DEFENSE DOESN'T SUBMIT ANYTHING I THINK BEFORE SEPTEMBER OF  
11:41AM 2 2016, EXCEPT FOR ONE OF THE DOCUMENTS AT ISSUE HERE. ALL OF  
11:41AM 3 THE DOCUMENTS THAT THE COURT IS CONSIDERING OCCURRED OR CAME TO  
11:41AM 4 BE BETWEEN THOSE TWO DATES.

11:41AM 5 SO WHILE THE DEFENSE WANTS THE COURT TO FOCUS ON THAT  
11:41AM 6 POSSIBLE JOINT REPRESENTATION AT THE BEGINNING OF THE TIME  
11:41AM 7 PERIOD AND ANOTHER POSSIBLE JOINT REPRESENTATION AT THE END,  
11:41AM 8 THOSE DON'T DIRECTLY BEAR ON THE COMMUNICATIONS ACTUALLY AT  
11:41AM 9 ISSUE HERE.

11:41AM 10 AND IT IS INCUMBENT, THE BURDEN IS ON THE PARTY ASSERTING  
11:42AM 11 NOT JUST TO ESTABLISH THE EXISTENCE OF THAT ATTORNEY-CLIENT  
11:42AM 12 RELATIONSHIP, BUT ALSO TO ESTABLISH THAT THE PRIVILEGE APPLIES  
11:42AM 13 TO THE COMMUNICATIONS AT ISSUE. THAT'S WHERE THE DEFENSE  
11:42AM 14 REALLY RUNS INTO TROUBLE HERE.

11:42AM 15 BESIDES THE FACT THAT THESE COMMUNICATIONS OCCURRED  
11:42AM 16 OUTSIDE THE TIME PERIODS COVERED BY THOSE ALLEGED JOINT  
11:42AM 17 REPRESENTATIONS, WE CAN ALSO SEE JUST FROM THE DESCRIPTIONS IN  
11:42AM 18 THE DEFENDANT'S PRIVILEGE LOG THAT THESE RELATE NOT TO MATTERS  
11:42AM 19 AFFECTING HOLMES INDIVIDUALLY IN HER PERSONAL CAPACITY, BUT  
11:42AM 20 MATTERS AFFECTING THE COMPANY, MATTERS THAT IMPLICATE HOLMES'S  
11:42AM 21 RESPONSIBILITY AS CEO, AS CORPORATE REPRESENTATIVE.

11:42AM 22 THESE ARE THE KINDS OF COMMUNICATIONS THAT ANY CORPORATE  
11:42AM 23 CEO WOULD BE HAVING WITH ANY COMPANY COUNSEL. THEY'RE NOT  
11:42AM 24 UNIQUE TO HER. THEY'RE IN FRONT OF THE COURT NOW BECAUSE  
11:42AM 25 THEY'RE ON THE GOVERNMENT'S EXHIBIT LIST, BUT OTHERWISE THERE'S

11:42AM 1 REALLY NOTHING SPECIAL ABOUT THEM.

11:42AM 2 THEY ARE THE SORT OF COMMUNICATIONS YOU WOULD EXPECT TO  
11:43AM 3 SEE BETWEEN ANY COMPANY'S CEO AND COUNSEL.

11:43AM 4 LOOKING AT THE SPECIFIC TOPICS COVERED HERE, I THINK IT  
11:43AM 5 JUST DRIVES THAT POINT HOME. FOR EXAMPLE, THE FIRST DOCUMENT  
11:43AM 6 ON THEIR PRIVILEGE LOG SAYS IT RELATES TO ATTORNEY-CLIENT  
11:43AM 7 COMMUNICATION REGARDING ATTORNEY BILLING ARRANGEMENTS IN  
11:43AM 8 ANTICIPATION OF LITIGATION.

11:43AM 9 THESE WOULD HAVE BEEN BILLING ARRANGEMENT FOR A LITIGATION  
11:43AM 10 OR REPRESENTATION WHERE THERANOS DID THE PAYMENT. SO TO THE  
11:43AM 11 EXTENT THAT BOIES SCHILLER IS HAVING A CONVERSATION WITH HOLMES  
11:43AM 12 ABOUT BILLING FOR THAT REPRESENTATION, HOW CAN IT BE ARGUED  
11:43AM 13 THAT THAT CONVERSATION IS IN HER PERSONAL CAPACITY AS PART OF  
11:43AM 14 HER INDIVIDUAL ATTORNEY-CLIENT RELATIONSHIP WHEN THE TOPIC IS  
11:43AM 15 BILLING WHERE THE BILLS GO TO THE COMPANY, THE BILLS ARE PAID  
11:43AM 16 BY THE COMPANY? THAT'S A CONVERSATION INVOLVING HER IN HER CEO  
11:43AM 17 CORPORATE REPRESENTATIVE CAPACITY ONLY.

11:43AM 18 SIMILARLY, DOCUMENTS 2 AND 11 ON THAT LIST RELATE TO  
11:44AM 19 COMMUNICATIONS WITH INVESTORS. HOLMES DID NOT HAVE A PERSONAL  
11:44AM 20 INDIVIDUAL BUSINESS RELATIONSHIP WITH THE INVESTORS. THESE  
11:44AM 21 PEOPLE WERE INVESTORS IN THERANOS, THE COMPANY.

11:44AM 22 TO THE EXTENT THAT THEY SIGNED INVESTOR AGREEMENTS, THOSE  
11:44AM 23 AGREEMENTS WERE SIGNED WITH THE COMPANY AS THE OTHER PARTY.  
11:44AM 24 THEY GAINED SHARES IN THE COMPANY IN CONNECTION WITH THEIR  
11:44AM 25 INVESTMENTS.

11:44AM 1 SO TO THE EXTENT THAT HOLMES WAS HAVING CONTACT WITH THEM,  
11:44AM 2 IT WAS AS A COMPANY REPRESENTATIVE. TO THE EXTENT THAT SHE WAS  
11:44AM 3 GETTING LEGAL ADVICE, THAT WAS LEGAL ADVICE FOR THE COMPANY IN  
11:44AM 4 CONNECTION WITH THAT ROLE AS CEO AND COMPANY SPOKESPERSON.

11:44AM 5 AGAIN, DOCUMENTS 4, 7, 8, AND 9, THOSE RELATE TO THE  
11:44AM 6 REGULATORY APPROVAL PROCESS BASED ON THE DEFENSE'S PRIVILEGE  
11:44AM 7 LOG. THESE WERE THERANOS'S REGULATORY SUBMISSIONS SEEKING  
11:44AM 8 APPROVAL FOR COMPANY TECHNOLOGY AND COMPANY PROCESSES.

11:44AM 9 THIS IS NOT ELIZABETH HOLMES PERSONALLY. SHE WASN'T LAB  
11:44AM 10 DIRECTOR, FOR EXAMPLE. SO THESE COMMUNICATIONS ON THEIR FACE,  
11:44AM 11 EVEN JUST BASED ON THE PRIVILEGE LOG, RELATE NOT TO HOLMES'S  
11:45AM 12 PERSONAL RIGHTS AND OBLIGATIONS SEPARATE FROM THE COMPANY, BUT  
11:45AM 13 RELATE SOLELY TO HER ROLE AS CORPORATE CHIEF EXECUTIVE AND A  
11:45AM 14 REPRESENTATIVE OF THE COMPANY.

11:45AM 15 AND THE CASE LAW MAKES IT CLEAR THAT IN THAT SITUATION THE  
11:45AM 16 TEST IS NOT MET THAT THE INDIVIDUAL PRIVILEGE CANNOT BE  
11:45AM 17 ASSERTED.

11:45AM 18 THE NEWPARENT CASE TELLS US THAT AN EMPLOYEE CAN ASSERT AN  
11:45AM 19 INDIVIDUAL PRIVILEGE ONLY TO THE EXTENT THAT COMMUNICATIONS  
11:45AM 20 REGARDING INDIVIDUAL ACTS AND LIABILITIES ARE SEGREGABLE FROM  
11:45AM 21 DISCUSSIONS ABOUT THE CORPORATION.

11:45AM 22 THE DEFENSE HAS NOT EVEN ATTEMPTED TO MAKE THAT SHOWING  
11:45AM 23 HERE AND THAT'S BECAUSE THEY CAN'T.

11:45AM 24 I'LL MAKE JUST ONE QUICK FINAL POINT, AND THAT'S THAT  
11:45AM 25 ALIGNED INTERESTS ARE NOT ENOUGH HERE. THE FACT THAT HOLMES'S

11:45AM 1 INTEREST MAY HAVE BEEN ALIGNED WITH THE COMPANY, AND I SUSPECT  
11:45AM 2 THAT THE COURT WILL SEE THAT IN WHAT THE DEFENSE PLANS TO  
11:45AM 3 SUBMIT TO THE COURT, BUT THE FACT THAT HOLMES'S PERSONAL  
11:46AM 4 FORTUNES MAY HAVE BEEN TIED WITH THE COMPANY IS NOT UNIQUE IN  
11:46AM 5 THIS CASE. THAT'S TRUE FOR ANY COMPANY FOUNDER AND CEO.

11:46AM 6 FOR ANY COMPANY AND FOUNDER AND CEO, THEIR PAY WILL RISE  
11:46AM 7 IF THEIR COMPANY DOES WELL. THEY MIGHT LOSE THEIR JOB IF THE  
11:46AM 8 COMPANY DOES POORLY, THEIR REPUTATION IS TIED INTO THAT OF THE  
11:46AM 9 COMPANY. SO ALIGNMENT OF INTEREST IS NOTHING UNIQUE HERE. IF  
11:46AM 10 THAT WERE ENOUGH TO FORCE THE COURT TO INFER A JOINT  
11:46AM 11 REPRESENTATION, THEN THERE WOULD BE A JOINT REPRESENTATION IN  
11:46AM 12 NEARLY EVERY CASE AND THE GRAF CASE WOULD LOSE ALL MEANING.

11:46AM 13 SO I'M HAPPY TO RESPOND TO ANY ADDITIONAL QUESTIONS THAT  
11:46AM 14 THE COURT MIGHT HAVE, BUT WITH THAT THE GOVERNMENT SUBMITS.

11:46AM 15 THE COURT: I DON'T HAVE ANY ADDITIONAL QUESTIONS  
11:46AM 16 NOW. I THANK BOTH PARTIES FOR YOUR PREPARATION.

11:46AM 17 I WILL DEFER RULING UNTIL I'VE HAD AN OPPORTUNITY TO  
11:46AM 18 REVIEW THE IN CAMERA SUBMISSION FROM THE DEFENSE, AND IF I DO  
11:46AM 19 GENERATE ANY ADDITIONAL QUESTIONS, I DON'T ANTICIPATE A NEED  
11:46AM 20 FOR A FURTHER HEARING, BUT IF I REVIEW THOSE AND HAVE SOME  
11:47AM 21 QUESTIONS, EITHER FACTUAL OR LEGAL TO POSE TO THE PARTIES, THEN  
11:47AM 22 I WILL RE-NOTICE IT FOR A FURTHER HEARING.

11:47AM 23 I SEE, MR. WADE, MAYBE HAS ONE MORE THING TO ADD TO THE  
11:47AM 24 RECORD. GO AHEAD.

11:47AM 25 MR. WADE: YOUR HONOR, I WAS HOPING TO BRIEFLY

11:47AM 1 REPLY. MR. BOSTIC RAISED SEVERAL NEW POINTS THAT HADN'T BEEN  
11:47AM 2 ADDRESSED. WITHOUT EXPANDING THE SCOPE OF THE ARGUMENT, IF I  
11:47AM 3 MIGHT TAKE 20 SECONDS AND REPLY TO THOSE POINTS?

11:47AM 4 THE COURT: NOTHING TAKES 20 SECONDS. BUT GO AHEAD,  
11:47AM 5 MR. WADE.

11:47AM 6 MR. WADE: I'LL DO MY BEST. AGAIN, THE ARGUMENT  
11:47AM 7 ABOUT THE APPLICATION OF BEVILL DEMONSTRATES WHY IT DOESN'T  
11:47AM 8 WORK HERE. BECAUSE IF YOU APPLY BEVILL AND THE FIVE FACTORS,  
11:47AM 9 THE FIFTH FACTOR, WHICH SAYS THAT THE INTERESTS HAVE TO BE  
11:47AM 10 DISTINCT FROM THE CORPORATION WOULD MEAN THAT AN OFFICER IN A  
11:47AM 11 CORPORATION COULD NEVER HAVE A JOINT REPRESENTATION, AND WE  
11:47AM 12 KNOW THAT'S NOT THE CASE. IT WASN'T THE CASE HERE IN THREE  
11:47AM 13 MATTERS, AND IT'S NOT THE CASE THROUGHOUT COURTS IN THIS LAND.  
11:47AM 14 THAT'S WHY BEVILL DOESN'T MAKE SENSE IN THE CONTEXT OF A JOINT  
11:48AM 15 REPRESENTATION. POINT ONE.

11:48AM 16 POINT TWO. WHY SOME OF THE COURTS, GRAF IN PARTICULAR,  
11:48AM 17 TALKS ABOUT THE PAYMENT OF LEGAL FEES, THAT WAS MORE OF AN  
11:48AM 18 ISSUE IN GRAF BECAUSE GRAF INVOLVED AN INDEPENDENT CONTRACTOR  
11:48AM 19 WHO WAS MAKING AN ARGUMENT THAT HE HAD SOME SEPARATE  
11:48AM 20 INDEPENDENT RELATIONSHIP WITH THE VERY SAME ATTORNEY, AND  
11:48AM 21 THAT'S WHY THERE'S SO MUCH DISCUSSION IN GRAF.

11:48AM 22 AS WE KNOW, YOUR HONOR, CORPORATIONS ROUTINELY INDEMNIFY  
11:48AM 23 INDIVIDUAL OFFICERS FOR -- IN CONNECTION WITH JOINT  
11:48AM 24 REPRESENTATIONS AND IN CONNECTION WITH LEGAL WORK DONE ON  
11:48AM 25 BEHALF OF THE INDIVIDUAL OFFICER IN CONNECTION WITH JOINT



11:48AM 1 REPRESENTATIONS, AND THAT'S EXACTLY WHAT HAPPENED HERE.  
11:48AM 2 THERE'S AN INDEMNIFICATION AGREEMENT THAT OBLIGATED THERANOS TO  
11:48AM 3 PAY LEGAL FEES FOR MS. HOLMES IN CONNECTION WITH JOINT  
11:48AM 4 REPRESENTATION. SO THAT'S OF NO MOMENT FOR THIS CASE AND  
11:48AM 5 SHOULD BE GIVEN LITTLE WEIGHT.

11:49AM 6 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. I  
11:49AM 7 THINK THAT GIVES ME PLENTY TO WORK WITH.

11:49AM 8 THANK YOU AGAIN FOR YOUR PREPARATION ON BOTH SIDES. YOUR  
11:49AM 9 BRIEFS WERE VERY HELPFUL.

11:49AM 10 WE WILL HAVE A WRITTEN ORDER, AND BOTH PARTIES WILL HAVE  
11:49AM 11 AN OPPORTUNITY TO ASSESS THAT AND FILE ANY OBJECTIONS BACK TO  
11:49AM 12 JUDGE DAVILA.

11:49AM 13 ALL RIGHT. HAPPY HOLIDAYS. WE'RE IN RECESS. THANKS  
11:49AM 14 AGAIN.

11:49AM 15 MR. LEACH: THANK YOU, YOUR HONOR.

11:49AM 16 MR. WADE: HAPPY HOLIDAYS. THANK YOU, YOUR HONOR.

11:49AM 17 MR. BOSTIC: THANK YOU, YOUR HONOR.

11:49AM 18 (COURT CONCLUDED AT 11:49 A.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large, decorative flourish at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

DATED: JANUARY 6, 2021